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No. 80-2134

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

FOREMOST INSURANCE COMPANY and SHIRLEY ELISER,
Petitioners,

versus

PANSY F. RICHARDSON, DONALD B. RICHARDSON, PATRICK S. RICHARDSON, JOSEPH S. RICHARDSON, LARRY S. RICHARDSON, CARLA RICHARDSON and JUNE G. ALLEN,
Respondents.

On Petition for a Writ of Certiorari to The United States Court of Appeals For the Fifth Circuit

SUPPLEMENT TO PETITION FOR CERTIORARI

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Pursuant to Rule 22.6, the petitioners, Foremost Insurance Company and Shirley Eliser, respectfully submit the following addition to their petition for certiorari. In particular, petitioners call attention to the new Fifth Circuit case of *Solyde Drilling & Marine Co. v. Coastal States Gas Producing Co.*, No. 78-2817 (5th Cir. 5-14-81) in supplementing the argument under their Second Reason for Granting the Writ. (Petition for Certiorari, pp. 15-22).

II. A Decision By This Court Is Necessary To Clearly Settle The Question Of Whether The Admiralty Jurisdiction Of The Federal Courts Should Be Extended To Accidents Occurring Between Purely Recreational Boats With No Commercial Connections.

. . . As previously noted, even though some lower courts have recognized the convincing argument supporting the denial of admiralty jurisdiction over non-commercial pleasure craft accidents, these courts have continued to extend admiralty jurisdiction to such cases because of misplaced reliance on implications from and assumptions about the *Executive Jet* decision. In fact, the lower courts have based their reluctant extension of admiralty jurisdiction to these non-commercial pleasure boat cases on three early decisions by

this Court that were not expressly overruled in *Executive Jet*. As indicated in the original brief, none of these early cases clearly settled the jurisdictional question presented in this action. For this reason, petitioners maintain that a continuing need exists for a decision by this Court based upon a forthright analysis of the pleasure boat problem.

The recent Fifth Circuit decision in *Solyde Drilling & Marine Co. v. Coastal States Gas Producing Co.*, supra (hereafter *Solyde*) emphasizes the unsettled nature of the jurisdictional issue presented in this case. In *Solyde*, the plaintiff had filed suit for property damages arising out of a blowout of its high pressure gas well which occurred while the defendant was performing a workover operation on the well from its submersible drilling barge which, at the time, was resting on the bottom of a dead-end dredged canal slip in Louisiana. The Fifth Circuit found that the district court had improperly assumed admiralty jurisdiction and held that for admiralty jurisdiction to lie over actions brought under the Admiralty Extension Act, the injury complained of must bear a significant relationship to maritime activity. The Court concluded that the plaintiff had failed to establish this requisite relationship.

Although this case dealt primarily with the application of the "locality plus" test to cases under the Admiralty Extension Act, the decision does contain two elements important to the disposition of the jurisdic-

tional question in the case at bar. The first element is the fact that the Fifth Circuit in *Sohyde* chose to rigorously apply a four factor test for admiralty jurisdiction that it had developed in *Kelly v. Smith*, 485 F.2d 520 (5th Cir. 1973). When applying this test to determine the substantial maritime relationship prerequisite to the extension of admiralty jurisdiction a court is to consider: (1) The functions and roles of the parties; (2) The types of vehicles and instrumentalities involved; (3) The causation and type of injury; and (4) Traditional concepts of the role of admiralty law.

When this test is as rigorously applied to the facts of this case as it was in *Sohyde*, those facts support a denial of admiralty jurisdiction. In particular, two of the factors indicate a lack of the substantial maritime relationship necessary for the extension of admiralty jurisdiction. First, as summarized by the trial judge in his opinion (at 470 F.Supp. 699, 700), based on the undisputed facts of this case, the *functions and roles* of the parties had nothing whatsoever to do with maritime commerce:

> (1) One boat was used for pleasure boating, such as boat riding and water skiing, and at the time of the accident the boat was actually pulling a skier on a zip sled;
>
> (2) The other boat was used exclusively for pleasure fishing and was described as a bass boat;

(3) Neither boat had ever been used in any "commercial maritime activity" before the accident;

(4) At the time of the accident neither boat was involved in any "commercial maritime activity" of any sort;

(5) Neither of the two drivers of the boats were being paid to operate the boats nor was this activity in any way part of their regular type of employment;

(6) None of the passengers on either boat were engaged in any kind of "traditional maritime activity" either before or at the time of the accident;

(7) Neither of the boats involved were under hire in any traditional maritime form;

(8) There is no evidence to indicate that any "commercial activity", even in the broadest admiralty sense, had ever been previously engaged in by either of the boats in question, and in fact the two boats would have to be classified as "purely pleasure craft", not in any way "involved in commerce"; and,

(9) There was no other instrumentality involved in this accident that had even a minor relationship to "admiralty" or "commerce"; i.e. a buoy, barge, oil drilling apparatus, etc.

Second, because of this absence of any connection between the accident and maritime commerce, under the *traditional concepts of the role of admiralty law*, admiralty jurisdiction is neither necessary nor appropriate. The Court's discussion of this factor of the *Kelly* test as applied in *Sohyde* is the second element of that decision important to the disposition of the jurisdictional issue in this case. In *Sohyde*, the court acknowledged that the case was "not of such a character that leaving the parties to pursue state law remedies would disturb the federal interest of maintaining the uniformity of maritime law." The Court further stated that "under the circumstances, we believe that the interests of federal-state comity would be best served by having this dispute resolved under state law." [#78-2817 (5th Cir. 5-14-81), at p. 7077].

The same reasoning supports a denial of admiralty jurisdiction in this case. Non-commercial pleasure boat collision disputes are not of such a character that leaving the parties to pursue state law remedies would disturb the federal interest of maintaining the uniformity of maritime law. As petitioners outlined in their First Reason for Granting the Writ, several noted authorities on admiralty jurisdiction agree that such jurisdiction should not be extended to pleasure boat cases unconnected with the commercial shipping industry.

In fact, the extension of admiralty jurisdiction to these cases is not supported by a need for uniformity of

law applied to these disputes. As Professor Stoltz has stated:

> ". . . where commerce stops, the need for uniformity also ends. If commerce is not involved, there is no national interest in uniformity and there is every reason associated with federalism for local power to govern events locally that have only local impact." (*Pleasure Boating and Admiralty: Erie at Sea*, 51 Cal. L.R. p. 661)

Furthermore, Stoltz believes that the operation of these small pleasure craft is so local in nature that a uniform body of law is a positive detriment.

In *Sohyde*, one panel of the Fifth Circuit Court acknowledged these interests of federal-state comity. However, the panel which decided this case failed to recognize that these disputes can and should be handled by the state courts. As indicated in their opinion, the panel believed that admiralty jurisdiction had to be extended to this case merely because the navigational Rules of the Road would be involved. (Appendix "A" of Petition)

The extension of admiralty jurisdiction based on the involvement of these Rules was a mistake. While federal navigational rules must be applicable to the operation of small pleasure craft in navigable waters, there is no impediment to the application of those requirements by the state courts. State courts are not only

allowed, but are mandated, to enforce federal statutes relating to navigation and are to give those rules the same construction as they are given by the federal courts sitting in admiralty. (See authorities cited in Reason III of Petition)

Thus, on the basis of an erroneous belief that only federal courts were authorized to apply the navigational rules, the Fifth Circuit panel in this case ignored the same interests of federal-state comity which have now been recognized by another panel in that same circuit court through the recent *Sohyde* decision.

CONCLUSION

These recent developments only serve to accent the continuing need for a decision by this Court on the important jurisdictional question presented by the facts of this case. Until such a decision is forthcoming, the interests of federal-state comity may continue to be ignored by courts acting without clear authority or analysis from this Court. Furthermore, the continued assertion of admiralty jurisdiction serves no beneficial purpose, since where maritime commerce ends, so ends the need for uniformity. In any event, the state courts are already authorized and mandated to apply navigational rules in conformity with federal court application of those rules. Therefore, both in the interests of comity and in order to relieve an unwarranted burden on the federal courts, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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July ____, 1981

CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the foregoing Supplement to Petition for Certiorari to the United States Court of Appeals for the Fifth Circuit have been served on the Honorable Roy Maughan, counsel of record for respondents, Pansy F. Richardson, Donald B. Richardson, Patrick S. Richardson, Joseph S. Richardson, Larry S. Richardson, and Carla Richardson and on the Honorable Victor Marcello, counsel of record for June G. Allen by depositing said copies in the United States mail, postage prepaid, this ____ day of July, 1981.

I further certify that all parties required to be served have been served.

ARTHUR HOWELL ANDREWS